In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4359

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, *Appellant*

vs.

TAYOKICHI YAMADA, *Appellee*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellant

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STATEMENT OF THE CASE

Tayokichi Yamada is an alien, a native and subject of Japan, of the Japanese race, thirty-seven years of age. He first entered the United States in 1902 and resided here until 1913. He then made

a trip to Japan where he resided one year, again entering the United States at Seattle, Washington, on May 21, 1914, under a passport describing him as a returned immigrant, and has lived in Seattle, Washington, at all times since his return.

On February 2, 1907, at Seattle, Washington, Yamada pleaded guilty to the crime of assault with a deadly weapon, and was sentenced to imprisonment for two years, at hard labor, in the Washington State Penitentiary at Walla Walla, Washington. Certified copy of judgment and sentence, as contained in the record herein, states that the defendant, Yamada, had been informed against for the crime of assault with intent to commit murder, on the first day of December, 1906, of his plea of not guilty to the offense charged in the information, of his withdrawal of said plea and of his entering a plea of guilty to assault with a deadly weapon, which plea the court granted.

Pursuant to warrant of arrest issued by the Secretary of Labor February 19, 1924, Yamada was arrested, and after a hearing and appeal to the Secretary of Labor, was ordered deported on the ground, "That he has been convicted of and admits the commission of a felony, or other crime

or misdemeanor involving moral turpitude, prior to his entry into the United States, to-wit: assault with a deadly weapon."

The alien refused to testify at the hearing, other than to admit his entry into the United States in 1902, and also in 1914, and he further admitted that he had been convicted of the crime of assault with a deadly weapon on February 2, 1907, and had been sentenced to imprisonment for two years in the Washington State Penitentiary.

After an oral argument and submission of written briefs, upon an order to show cause why a writ of habeas corpus should not issue, the United States District Court, Western District of Washington, Northern Division, by Judge Neterer, granted the writ, on the ground that Section 19 of the Immigration Act of 1917, imposes a five year limitation after entry upon the right of the Government to deport an alien after the commission of a felony or other crime or misdeameanor, involving moral turpitude. Subsequently, an order was entered discharging the alien, and from this order proceedings to perfect appeal have been duly instituted by the Commissioner of Immigration.

ASSIGNMENTS OF ERROR

I

The Court erred in holding that deportation proceedings were not commenced within the time allowed by statute.

II

The Court erred in holding and deciding that a writ of habeas corpus be awarded the petitioner herein.

III

The Court erred in holding, deciding and adjudging that the petitioner be discharged from the custody of Luther Weedin as Commissioner of Immigration at the Port of Seattle, Washington.

IV

The Court erred in deciding, holding and adjudging that the petitioner was not subject to deportation but was entitled to remain in the United States and was entitled to be at large.

ARGUMENT

The Lower Court Misconstrued Section 19 of the Immigration Act of 1917, in Holding That There Is a Five Year After Entry Limitation Upon the Right to Deport

It has always been considered by the Bureau of Immigration that deportation under Section 19, for conviction, or the admission of the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude, may be had irrespective of the time of entry. See page 30 of Analysis of Immigration Laws, issued by United States Department of Labor, 1924. As will be subsequently pointed out, this construction is amply supported by the authorities.

Section 19 of the Immigration Act of February 5, 1917, sets out numerous grounds under which an alien may be deported from the United States after entry. For some of the grounds a time limitation is imposed, limiting the right of the Government to deport an alien within a certain period, dating from his last entry. A summary of the grounds follows:

1. At any time within five years after entry, an alien who at the time of his entry was the member of one or more of the classes excluded by law.

2. An alien who shall have entered, or who shall be found in the United States in violation of this act, or in violation of any other law of the United States. No time limitation.

3. An alien after entering found advocating or teaching unlawful destruction of property, or advocating or teaching anarchy or overthrow by force or violence of the Government of the United States, or all form of law, or assassination of public officials. No time limitation.

4. An alien who, within five years after entry, becomes a public charge, from conditions not affirmatively shown to have arisen subsequent to landing. No time limitation as to right to institute deportation proceedings.

5. An alien who is hereafter sentenced to imprisonment for a term of one year, or more, because of conviction in this country of a crime involving moral turpitude, committed within five years after entry, or who is hereafter sentenced more than once to such a term of imprisonment, because of conviction in this country of any crime involving moral

turpitude committed at any time after entry. No limitation upon right to institute deportation proceedings.

6. An alien found an inmate of, or connected with a house of prostitution, or one practicing prostitution after entering the United States, or one receiving a share in the earnings of a prostitute, or managing, or employed by, or in connection with a house of prostitution, or one importing, or attempting to import, persons for the purpose of prostitution. No limitation.

7. "Any alien who was convicted or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude." No time limitation.

8. An alient entering the United States by water or by land at a time or place other than is designated by immigration officials, or the Commissioner General of Immigration, or who enters without inspection. In this case deportation may be instituted only within three years after entry.

It will thus be seen that the District Court has read into the portion of Section 19, pertaining to deportation for the conviction or admitting the commission of a felony, or other crime or misde-

meanor involving moral turpitude, a time limitation which is not there. It would seem that the ordinary elementary principles of statutory construction precludes such a construction. The statute is so clear in omitting the time limitation feature as to this ground of deportation that the courts, except in one or two instances, have not been called upon to construe a claim of time limitation.

The only case in which this point was squarely raised is that of *Lauria v. United States*, 271 Fed. 261, (writ of certiorari denied).

In this case decided by the Circuit Court of Appeals, Second Circuit, on February 9, 1921, the alien, Lauria, first entered the United States on December 27, 1914. Prior to this time, on May 30, 1912, he had been denied the right of admission, for the reason that he had been convicted of a crime involving moral turpitude, to-wit: highway robbery, prior to his entry. Upon his entry in 1914, he falsely stated to the immigration officials that he was a resident of the United States, and thus gained his admittance. He was later taken into custody on a warrant of arrest dated December 10, 1919, signed by the Secretary of Labor. After a hearing he was ordered deported on May 5, 1920, on the ground that upon his own

admission, he was guilty of a crime involving moral turpitude, before his entry to this country. It was urged that the first three lines of Section 19 of the Immigration Act of 1917, provide for the deportation, within five years after entry, of any alien who at the time of his entry was a member of one or more of the classes excluded by law, and that the time limit for his deportation had expired. The Court, per Manton, Circut Judge, referring to Section 3 providing that "any alien who was convicted, or who admits the conviction, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude," shall be taken into custody and deported, stated:

"It will be observed that section 3 is a provision intended to exclude certain classes of undesirable aliens. Section 19, in the first three lines, provides in general terms for exclusion within five years, of any alien who, at the time of entry, was a member of one or more of the classes excluded by law. But the act then proceeds to state specifically what aliens are to be deported. From the general provision of the first three lines, the act specifically enumerated classes to be excluded, but provides amplification of the general provisions of the first three lines and reads: * * *

" 'Any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude

* * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.'

"Effect must be given to each provision of the act. The five-year limitation contained in section 19 is not exclusive, and the five-year limitation must give way to the particular provision of the act which extends the time during which deportation may be made by reason of the latter provision of the statute just referred to. Since it is provided by section 3 that certain classes, 'idiots, imbeciles, feeble-minded persons, epileptics, insane persons, * * * persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude,' shall be excluded from the United States, it is apparent that Congress intended, when it legislated as to this, in section 19 of the act, to extend the time for deportation to the specific cases mentioned beyond the five-year period. It is only by this construction of the statute, that due regard can be given to each provision of section 19. To so construe the act as to require the apprehension and taking into custody and deporting the emigrant prior to the five-year limitation, would be to disregard some of the provisions of section 19 and would lead to conclusions which would be dangerous to the public. We think Congress intended to pronounce classes of aliens who are undesirable and, by general provision of law, exclude all within five years, but provided specifically that certain classes, including the class to which the appellant belongs, might be taken into custody and deported at any time. Congress has the power to order the deportation of aliens who

are undesirable in the United States. Bugajewitz v. Adams, 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. 978."

Judge Neterer, in his opinion, attempts to distinguish the *Yamada* case from the *Lauria* case, on the ground that the portion of the court's holding in the *Lauria* case, pertaining to an absence of time limitation, is *obiter dictum.* It is true that in the *Lauria* case the proceedings instituted by the issuance of a warrant of arrest by the Secretary of Labor occurred a few days prior to the expiration of five years after date of entry. However, the holding was not *dictum* because a claim was made by Lauria that the *warrant of deportation* must come within the five-year period, and it was, therefore, necessary for the court to decide whether there was, in fact, a five-year limitation provided by statute. It is thus seen that we have a square holding in favor of the Government's contention.

Judge Neterer cited *Hughes v. Tropello*, 296 Fed. 306, a case cited by the Circuit Court of Appeals, Third Circuit, as a holding in accord with his construction of section 19. In this case the alien arrived at the Port of New York on November 12, 1915, and an order of exclusion was executed for deportation, on the ground that he was feeble-minded, and likely to become a public charge. He was

allowed to enter, however, upon giving a bond. On April 19, 1919, a warrant of arrest was issued, and he was taken into custody, on the ground that he was in the United States in violation of the Immigration Act of 1917, that he was feeble-minded at the time of his entry and that he was likely to become a public charge. After various hearings, an order of deportation was issued, dated April 5, 1921. A writ of *habeas corpus* was issued and the holding of the District Court was affirmed on appeal, the granting of discharge of the alien being based on the fact that the deportation was not affected within the five-year limitation prescribed by the Act of 1917. It was stated by the court:

"Referring to Section 19, it must be clear that inasmuch as this section embraces every possible case where deportation can be had, the five-year limit therein fixed must prevail, unless such limitation is removed by an exception specified therein; *and we find such exception embracing a large number of cases in Section 19.*" (Italics ours.)

In these words the court recognizes the fact that not all the classes specified in Section 19 are deportable under the five-year limitation. The grounds under which the deportation was claimed in the *Tropello* case are embraced within the first three lines of Section 19, and the five-year limitation, therefore, clearly applies.

Guiney v. Bonham, 261 Fed. 582, is a strong case supporting the right of the Government to deport this alien at any time after entry. In this case, Guiney, a native of British Columbia, entered the United States in February or March, 1913. In 1916 he became a member of the Industrial Workers of the World, and held various offices in that organization. On February 18, 1919, the Department of Labor issued its warrant of arrest, on the ground that he had been found advocating or teaching the unlawful destruction of property, and sought his deportation under Section 19 of the Immigration Act of 1917. His order of deportation was subsequently issued and writ of *habeas corpus* was refused, and the holding of the lower court was affirmed on appeal. The ground of the petition for a writ of *habeas corpus* was that the right of deportation, under Section 19, is barred for five years from date of entry. The court stated that it did not so read the statute.

"It is plainly the intention of the statute to provide for the deportation of any alien who (at any time after entry) shall be found advocating or teaching the unlawful destruction of property. The five-year limitation in the first clause of the statute is not to be read into the clause in which the appellant is ordered deported."

THE LAST ENTRY OF THE ALIEN IS THE ENTRY REFERRED TO IN SECTION 19 OF THE IMMIGRATION ACT OF 1917.

It may be claimed that the commission of a felony or other crime involving moral turpitude must have occurred prior to the alien's original entry into the United States. Such a contention is, of course, without merit since the last date of entry controls.

Woo Shing v. United States, 282 Fed. 498;
Sinis Calchi v. Thomas, 195 Fed. 701.

THE IMMIGRATION ACT OF 1917, SECTION 19, AUTHORIZES THE DEPORTATION OF ALIENS ENTERING BEFORE ITS PASSAGE.

It may be urged that the Act of 1917 is not retroactive, and that an alien entering before its passage cannot be deported under any of its provisions. This point has been raised a number of times and the courts have repeatedly held that the act allows deportation of any alien found in this country, irrespective of the date of his entry.

Lauria v. United States, supra;
United States v. Tod, 289 Fed. 60;
Hughes v. Tropello, 296 Fed. 306;
Akiro Oono v. United States, 267 Fed. 359.

THE CRIME WHICH YAMADA PLEADED GUILTY TO AND WHICH HE ADMITS THE COMMISSION OF WAS BOTH A FELONY AND A CRIME INVOLVING MORAL TURPITUDE, EITHER OF WHICH IS SUFFICIENT TO ALLOW DEPORTATION.

It will be noted that that portion of Section 19 under which deportation is predicated in this case refers to the conviction or admitting the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude. It is submitted that the existence of a felony is sufficient, without proving or showing that such felony was a crime involving moral turpitude.

Yamada in 1907 was informed against on the charge of assault with intent to commit murder. He was allowed to plead guilty to the crime of assault with a deadly weapon. This crime is contained in Section 2749, Remington & Ballinger's 1910 Code (State of Washington), Laws of 1869, page 203, paragraph 29.

"Assault with deadly weapon, etc.—To do bodily harm—An assault with a deadly weapon, instrument or other thing, with an intent to inflict upon the person of another a bodily injury where no considerable provocation appears, or where the circumstances of the assault show a wilful, malignant and

abandoned heart, shall subject the offender to imprisonment in the penitentiary not exceeding two years, or to a fine not exceeding Five Thousand ($5,000) Dollars, or to both such fine and imprisonment."

It will thus be seen that not only is the crime to which the defendant pleaded guilty a felony, since it is punished by imprisonment in the penitentiary, but that the defendant's offense was so grave that the court felt justified in imposing the full maximum punishment of two years in the penitentiary, as provided by statute.

The plain wording of Section 19 seems to allow deportation if a felony has been committed, without respect to its moral turpitude feature, this probably because Congress had in mind that the commission of a felony is an act involving moral turpitude, and added the additional words, allowing deportation for a crime other than a felony, or even a misdemeanor, provided, only, such other crime or misdemeanor involved moral turpitude.

If Your Honors should be of the opinion, however, that Section 19 requires that the crime not only be a felony, but also possess the feature of moral turpidtude, then it is submitted that such a requirement is fully answered in the instant case. The

words of the Washington statute defining the crime require, "an intent to inflict upon the person of another a bodily injury." It is difficult to perceive how such an act could be anything but an act involving moral turpitude, and further argument will not be devoted to this aspect of the case.

In the case of *Russeau v. Weedin*, a case decided by Your Honors on November 20, 1922, and contained in 284 Fed. 565, a writ of *habeas corpus* had been denied the appellant, who was ordered deported on the ground that he had been convicted of the crime of being a "jointist," and sentenced to the State Penitentiarly to serve at hard labor from one to five years. While at large pending his appeal to the Supreme Court of the state, he left the United States and went to Canada. After the affirmance of his conviction, he returned to the State of Washington, entering at the Port of Blaine, falsely claiming to be a citizen of the United States. One of the grounds of his deportation was that, prior to his entry, he had been convicted of a crime involving moral turpitude. The opinion of the court, per Gilbert, Circuit Judge, states:

"A 'jointist,' under the statute of Washington (Laws of 1917, p. 60, par. 11) is one who opens up and conducts a place 'for the unlawful sale of intoxicating liquor,' and the offense is declared to

be a felony punishable by imprisonment of not less than one year or more than five years. The only question before this court is whether or not the crime involves moral turpitude. We think that the court below properly ruled that it does. The name of the crime is itself expressive of the degraded nature of the place at which the unlawful sale of intoxicating liquor is carried on. It suggests a resort of ill repute, and we think it may be affirmed that any one who wilfully opens a place for conducting a business which is positively forbidden and made punishable by law as a felony is guilty of an offense which involves moral turpitude."

Respectfully submitted,

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